United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7313

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PRESCOTT H. RATHBORNE,

Plaintiff-Appellant,

-against-

S. GARFINKEL and 873 THIRD AVENUE CORP.,

Defendants-Appellees,

-and-

CITADEL MANAGEMENT CO., INC., URBAN RELOCATION CO., INC., EDWIN J. GLICKMAN, ODYSSEY HOUSE, INC., and SALBIAN REALTY CO., INC.,

Defendants.

(ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK)

PLAINTIFF-APPELLANT'S BRIEF

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2. Was plaintiff-appellant denied a fair trial by the manner in which the case was tried?

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Docket No. 75-7313

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PRELIMINARY STATEMENT

This is an appeal from a final judgment of the United States District Court for the Southern District of New York (Solomon J.) entered in this action on April 24, 1975 dismissing the action and the counterclaim of S. Garfinkel after trial.

PRIOR PROCEEDINGS

This diversity action by a tenant was commenced against his landlord (S. Garfinkel and 873 Third Avenue Corp. ["873"], a real estate developer, (Salbian Realty Co., Inc. ["Salbian"] and Edwin J. Glickman), relocation and management companies (Urban Relocation Co., Inc. ["Urban"] and Citadel Management Co., Inc. ["Urban"] and Citadel Management Co., Inc. ["Citadel"]) and a drug rehabilitation organization (Odyssey House, Inc. ["Odyssey"]) to recover damages for the harassment of the tenant by the various defendants which caused him to vacate his most valuable apartment.

The claims against defendants Citadel, Urban, Glickman, Salbian and Odyssey were dismissed without prejudice by stipulation prior to trial. The remaining cause of action against Garfinkel and 873 charged them with a concerted campaign to drive plaintiff-appellant from his rent controlled apartment at 200 East 32nd Street in New York City ("the premises") for their own economic gain. The acts of harassment charged in the complaint and proven at trial were:

1. Depriving plaintiff of heat, electrical and other vital services;

2. Petitioning to decontrol plaintiff-appellant's apartment on various improper grounds;

3. Threatening plaintiff-appellant's life and property specifically including the axing of plaintiff-appellant's front door on June 27, 1972;

4. Refusing to provide a secure lock at the entrance to the building where plaintiff-appellant resided;

5. Refusing to provide plaintiff-appellant with an operational door buzzer system;

6. Refusal to make repairs to his apartment when needed;

7. Placing garbage in the hall in front of plaintiff-appellant's apartment and grease on the front door thereof;

8. Refusing to paint plaintiff-appellant's apartment when due.

As a result of the foregoing harassment plaintiff-appellant suffered grevious mental anguish and incurred huge expenses to maintain his residence. Finally in November, 1972, because of the harassment of Garfinkel and 873 plaintiff-appellant was driven to vacate the premises.

The action was tried on October 21 and 22, 1974 before the Honorable Gus J. Solomon, Senior Judge, sitting by Special Assignment in the Southern District of New York, without a jury. Judge Solomon rendered his decision on April 24, 1975.

STATEMENT OF FACTS

Plaintiff - Appellant's Case

A. History of Tenancy

Plaintiff-appellant who now resides in New Orleans, Louisiana entered into a lease with 873 to rent Apartment 5 at the premises from January 1, 1966 to December 31, 1967 at a rent of $250 per month. Paragraph "36" of the lease (213A)• gave Rathborne the right to make changes to the roof covering. On January 1, Rathborne moved into the premises. Prior to moving in plaintiff-appellant had told Garfinkel, President of 873 and his attorney Max Steinberg, Esq. he also desired

• Refers to page number in Appendix

to rent Apartment 4 which was directly below Apartment 5 and to make extensive improvements to both apartments, including the building of a roof garden. (1A-5A).

On June 2, 1966 plaintiff-appellant and 873 entered into a lease for Apartment 4 at the premises from June 1, 1966 to May 31, 1968 at a rent of $250 per month. Paragraph "35" of that lease purported to give plaintiff exclusive use of the roof extension. Relying upon this plaintiff-appellant expended thousands of hours of effort and many thousands of dollars improving the roof extension and creating a fabulous roof garden. The two apartments were connected by an inner stairway. No one had access to the upper floor of the premises where Apartment 5 was located other than plaintiff, his employees and guests. (1A-5A, 46A-47A). In 1966 and 1967 the relations between plaintiff-appellant and Garfinkel were not good (44A-45A). After termination of the periods in the two leases plaintiff remained on as a statutory tenant.

B. Air Conditioning Unit on Roof Extension

When plaintiff-appellant moved into Apartments 4 and 5 there was no air conditioning unit on the roof extension. In fact, in June, 1966 he was given exclusive use of the roof extension. Rathborne was not aware that on February 14, 1966 873 and Garfinkel had given Munchtime, U.S.A., Inc. ("Munchtime") the right to instal air conditioning equipment on the same roof extension. Sometime in 1967 the unit was installed by Munchtime for use in the summer of 1967. Prior to the installation no one informed Munchtime that Rathborne had exclusive use of the roof

extension. No one asked plaintiff-appellant for his permission for the unit to be installed. He told Garfinkel and Steinberg that he had exclusive use of the roof and wanted the unit off. They told him they did not care (5A-10A, 146A-149A).

Steinberg's testimony that Garfinkel informed him that Rathborne had given an oral waiver of his exclusive use of the roof terrace is difficult to follow since Steinberg and Garfinkel both knew that they had given Munchtime the right to instal the unit in February. 1966 and had not given plaintiff the exclusive use of the roof extension until June, 1966. Furthermore Mr. Steinberg is too good a landlord-tenant lawyer to permit an oral waiver of rights by a tenant (178A-179A).

Plaintiff-appellant permitted repair people to go on the roof to repair the unit until 1972, although he complained verbally and once in writing in 1971 (215A). Finally when the visits became too much plaintiff refused access to the extension from his apartment and wrote several letters to defendants complaining of the situation (216A-218A). In June, 1972 Garfinkel ordered men in uniforms to shove past Rathborne onto the roof extension. Garfinkel said he did not care what plaintiff-appellant said and directed the men to push past him on to the roof. This type of incident was repeated several times between June and November, 1972 (11A-14A). Rathborne's former housekeeper Ethel Nicholas recalled that the air conditioning unit made a lot of noise and men came often to fix it (47A-48A).

At Rathborne's request his attorney, Bradley Davis, Esq. requested defendant-appellee's to remove the air conditioning unit in 1972. They refused. He brought an action for the removal. A preliminary

injunction was denied. Prior to trial plaintiff-appellant moved out (November, 1972)and the action was dismissed (98A-99A).

C. Use of Apartment For Business

The lease to Apartment 4 (Additional Provision No. 4) specifically states plaintiff-appellant shall have the right to use the apartment for business use as may be required (219A). Provision No. 2 even gave plaintiff-appellant the right to put signs in the halls, doors and on the street, thereby recognizing that plaintiff-appellant intended using Apartment 4 for business purposes.

Plaintiff-appellant used the duplex apartment as a residence, for picture taking and for MIND a foundation founded by him which had done experimental research in educational matters. The apartment was used approximately once a week for meetings of three or four people and plaintiff-appellant had several people such as Julie Allen and Gay Jordan doing research (17A-20A).

Yet in 1970 Rathborne was told by Garfinkel or Steinberg that he couldn't use the apartment for business purposes and had to rent other space in the building for business use (22A). In the Spring of 1971 plaintiff-appellant informed Davis he did not really want the additional space. Davis told Steinberg Rathborne no longer wanted this extra space and was told he'd see Davis in Court. On Davis' advice Rathborne vacated this extra space (96A-98A).

Mr. Steinberg testified that the certificate of occupancy precluded defendant-appellee's from giving plaintiff-appellant the right to use the premises for business purposes. Yet, he still drew the lease giving Rathborne the right to use the apartment "for business use as may be required." Rathborne and his attorney were not bound to

check the certificate of occupancy. They were entitled to rely upon the representations of defendants-appellees and their attorneys that they had the right to give Rathborne the apartment for residential and business purposes (186A-188A).

An action was commenced by defendants-appellees for rent on the commercial space, but it was subsequently withdrawn by them (99A-100A).

D. Rent Overcharges

Although the maximum rents for Apartments 4 and 5 was $500 per month and the leases for the two apartments called for that rental plaintiff-appellant was charged $575 by defendants-appellees for a long period of time. When they refused to voluntarily remit the overcharges to plaintiff-appellant Mr. Davis commenced an action to recover the overcharges. Only after plaintiff-appellant was granted summary judgment did defendants agree to settle the case for $2,000, the amount of the recoverable overcharges (93A-95A).

Again defendants-appellees' response is an oral agreement by Rathborne to pay the additional rent to defendants. This was communicated by Garfinkel to Steinberg. Nothing in writing, just an oral agreement to pay an illegal rental that is the defense raised by the defendants-appellees. It was worthy of little weight (189A-192A).

E. Threats

Some of the threats by Garfinkel may be contained in other sections such as the sections dealing with the axing and the air conditioner on the roof extension. In this section I will discuss threats to plaintiff-appellant not directly related to the other sections.

On February 1, 1972 in Justice Wahl's chambers in the New York State Supreme Court Garfinkel told Rathborne he was going to take care of him. That he (Rathborne) was playing with people he shouldn't mess with. Present during this tirade in addition to Justice Wahl, Garfinkel and plaintiff-appellant were their attorneys, Steinberg and Davis and Julie Allen one of Rathborne's friends and employees. Davis recalled Garfinkel saying, "we'll get you, you little son of a bitch." Miss Allen recalled Garfinkel saying, "I'm going to get him." Both recalled Steinberg had to restrain Garfinkel (14A-15A, 59A-60A, 96A-98A).

In the summer of 1971 Garfinkel asked plaintiff-appellant if he'd be cooperative about moving. Plaintiff said he would. There was no offer of money or request for money. They discussed the fact that a builder was assembling buildings on the block. Garfinkel told Rathborne he wouldn't sell for $2,000,000. He then told plaintiff-appellant that people who didn't cooperate were held up. Garfinkel told him he'd better cooperate (31A-33A).

Once in a courthouse hallway Garfinkel said to plaintiff-appellant "you'd better watch out, you're going to get it. You heard me before. I warned you. You know what happens to people like you. You're going to get it." (33A-34A).

Garfinkel also threatened plaintiff-appellant on his roof and in his apartment. Some of these threats were overheard by Ethel Nicholas who heard Garfinkel tell plaintiff-appellant he wanted him out. (34A-35A, 51A, 57A-58A).

Once Steinberg told Davis "you know what happens to people like that (Rathborne). I don't know what you are doing defending a client like that. I warn you, this is really silly of you." Davis told plaintiff-appellant of this conversation (22A-24A).

In September, 1972 in Steinberg's office Steinberg told Davis he wouldn't give 2¢ to get plaintiff-appellant out. Davis told him plaintiff-appellant had a substantial investment in the apartment. Steinberg said he was going to get plaintiff out and would pursue whatever means were necessary to get plaintiff out. The block was being assembled and they (defendants) had turned down a $1,000,000.00 offer for the building. They just wanted the son of a bitch (Rathborne) out. Davis informed plaintiff-appellant of this conversation (111A-114A).

F. Axing.

On June 27, 1972 an unknown man pounded on Rathborne's door with a six foot pole containing a metal hook for about one minute. After he left, both plaintiff-appellant and his neighbor Sylvia Pafenyk called the police who arrived in about forty five minutes. After the axing Garfinkel came upstairs to where Rathborne and Miss Pafenyk were standing in the hallway. Plaintiff-appellant testified he was frothing at the mouth and said, "I warned you. I told you about moving. You're going to get it. You know what happens to people like you. What's going happen to you and your furniture is nothing like what happened to the door." (35A, 67A-68A)

Julie Allen who was present during the incident recalled Garfinkel pointing his finger at plaintiff-appellant saying "this is

enough, this is only the beginning if you don't co-operate with these people. This is nothing compared to what can happen if you don't cooperate." (60A-61A, 64A).

Even Miss Pafenyk who seemed to like Garfinkel testified that Garfinkel told plaintiff-appellant he had brought this on himself, that it was only the beginning. She testified Garfinkel was very threatening and told plaintiff he might come to some harm if he continued to do what he was doing. Plaintiff-appellant remained silent (69A-72A). Although Garfinkel claimed he repaired the door, plaintiff-appellant, Mrs. Nicholas and Miss Allen all testified it was never repaired prior to Rathborne's vacating the apartment, although plaintiff-appellant requested it (38A-39A, 55A-56A, 61A, 210A-211A, 220A)

G. Tampering with Electricity

In the summer of 1972 the electricity in plaintiff-appellant's apartment was off for about one month. He was able to get some current by taping the lights in the hallway. According to Miss Allen, plaintiff-appellant seemed trapped by the situation. When Consolidated Edison men came to repair the electricity Garfinkel refused them access to the basement. Davis' attempts to gain access from Steinberg also failed. Steinberg said if you want to play dirty, we'll play dirty. Finally, Davis obtained a court order directing plaintiff-appellant be given access. Plaintiff-appellant's repairman found that the electricity had been tampered with (41A-42A, 53A-54A, 62A-63A, 105A-107A, 221A-227A).

H. Roof Door Lock

For his own protection, and with the defendants' consent, early in his tenancy, plaintiff-appellant installed a bolt on the door leading to the roof. In 1972 he was informed this was a fire violation. Attempts by Davis to work matters out with Steinberg were, as usual, to no avail. Steinberg told Davis that they would evict plaintiff-appellant if a violation was placed on the building, on the ground it would be a breach of the lease. Davis and plaintiff-appellant appeared in court in order to work things out, but plaintiff-appellant moved before a resolution of the matter. It should be noted that at this time the front door lock was broken (40A-41A, 108A-110A, 228A-231A).

I. Action to Decontrol Apartment #4

Despite the fact that defendants-appellees well knew that Apartments 4 and 5 were occupied by plaintiff-appellant as one duplex apartment, they brought a proceeding to decontrol Apartment 4 on July 20, 1972, after first requesting that plaintiff-appellant restore the stove and refrigerator to Apartment 4 in order to make it look more like there were two apartments. Rathborne of course, had no need for a second kitchen and so informed defendants. Without inspecting the apartment or holding a hearing the District Director decontrolled Apartment 4. Plaintiff-appellant appealed, but moved from the apartment before the appeal was heard. Judge Solomon was not bound to follow the order of the District Director decontrolling Apartment 4. This proceeding was another attempt b y defendants-appellees to force Rathborne out of the building (114A-116A, 232A-243A).

H. Greasing, Garbage, etc.

On three occasions plaintiff-appellant found fetid grease on

his door and door buzzer (15A, 50A). There was garbage in the halls (26A-27A, 48A-49A); no heat in winter (24A-25A); the door buzzer to the street was inoperable and the door lock didn't work (28A-29A, 244A-246A) and the roof leaked, defendants-appellees refused to repair compelling plaintiff-appellant to have it repaired (30A); Garfinkel and others walked on the roof many times (16A, 29A-30A, 52A-53A, 218A).

I. Anonymous Incidents

Plaintiff-appellant testified he received approximately thirty anonymous phone calls and that people were constantly knocking at his door stating they had packages for him. When plaintiff-appellant refused to open the door they would leave. While Ethel Nicholas was alone in the apartment she had the same experience of people knocking on the door. She would refuse to let them in. On several occasions objects were thrown on plaintiff-appellant's roof terrace (16A-17A, 36A-37A, 53A).

J. Legal Proceedings

Davis represented plaintiff-appellant in court on approximately twenty occasions involving defendants-appellees in 1972. Davis directed a tender of rent by Rathborne in 1972, but Garfinkel refused to accept. Defendants-appellees then commenced an action for Rathborne's eviction, which was later dismissed. Defendants-appellees brought a total of four eviction actions against plaintiff-appellant while he was represented by Davis as well as a proceeding before the Rent Commission. Finally after the constant harassment plaintiff-appellant commenced a harassment proceeding against defendants-appellees before the Department of Rent and Housing Maintenance. No action was taken in that proceeding before plaintiff-appellant moved out (100A-102A, 244A, 247A-250A).

K. Effect of Harassment on Plaintiff-Appellant

The aforesaid harassment began to dramatically affect plaintiff-

appellant in 1972. He looked pale, was sick, lost weight, became more nervous and paranoid, was flipping out, screamed and cried. Miss Allen felt his fears were justified. She became fearful herself. Davis found him to be irrational, in a state of terror and not functioning well. Ethel Nicholas, Julie Allen and Bradley Davis all testified that plaintiff-appellant mental state deteriorated in 1972 (20A-21A, 56A, 65A-66A, 103A-104A).

After the axing Rathborne bought a Doberman Pinscher for his own protection. He took the dog with him everywhere. The dog helped but he still felt terrorized (36A-37A, 251A).

In the fall of 1972 Davis sent plaintiff-appellant to Dr. John Casarino, a psychiatrist. The purposes of the consultations with Dr. Casarino were to fully diagnose Rathborne's condition and determine what would alleviate it. Admittedly, at this time plaintiff-appellant was already thinking of vacating the apartment because of the harassment and moving to New Orleans and was contemplating the bringing of this action and foresaw the use of Dr. Casarino as a witness at trial. There is no difference between that and an accident victim going to a physician to determine his injuries and the treatment required well knowing the doctor might at a later date be used as a witness to testify about the injuries (20 A, 42A, 103A).

Dr. Casarino, a psychiatrist at St. Vincent's Hospital in New York City examined plaintiff-appellant on October 9, 1972 and again in November, 1972. He found him extremely distraught and disorganized. It was difficult to get his history. He found plaintiff-appellant on the verge of a psychosis decompensation (nervous breakdown), unable to answer questions well, his thinking was disorganized, he displayed psychomotor agitation, he was depressed, unable to sit down, paced about a great deal. Rathborne had his dog for protection, was frightened, his thinking was tangential, his thought

process was disorganized. Rathborne told Dr. Casarino he rarely ventured out of the house, didn't date or see friends, had lost 20 pounds, cried, was irritable and his personality was changing (117A-120A, 125A).

Dr. Casarino recommended medication and psychotherapy to plaintiff-appellant. He refused either and told Dr. Casarino he was thinking of moving to New Orleans. The doctor agreed this was good, since the change in environment would remove the stress and help plaintiff-appellant. Without this change and without either medication or therapy plaintiff-appellant would have become psychotic (120A-121A, 126A).

Dr. Casarino recommended plaintiff-appellant get therapy in New Orleans. He received a letter from plaintiff indicating that he did receive therapy there. Dr. Casarino next saw plaintiff-appellant on March 8, 1974 and found him to be relaxed, smiling, his speech was not pressured and he had none of the disorganizztion previously noted. He answered questions frankly and completely in March, 1974. The symtoms seen in October and November, 1972 were no longer present (121A-125A).

Dr. Casarino agreed that the change in plaintiff-appellant's neighborhood, the building of a methodone clinic in his neighborhood and people from the clinic in his hallway would have been factors contributing to plaintiff-appellant's fears. But, fighting legal proceedings to evict him from the apartment would not have contributed to his condition. He was not having hallucinations about these proceedings. Odyssey House, garbage strewn in the hallway, the landlord's attempts to get rid of him and the turning off of electricity were seen by plaintiff-appellant as threats (127A-132A).

Although plaintiff-appellant had seen psychiatrists in the past the testimony from him, Ethel Nicholas, Julie Allen and Bradley Davis clearly supports the fact that his mental condition severally deteriorated in 1972 causing him to lose weight, become fearful, nervous, pale and sick. While some of this may well have been caused by the change in the neighborhood, most of his mental problems were caused by defendants-appellees' various attempts to get him out of the premises. Because of these actions plaintiff-appellant felt compelled to leave his apartment, where he had intended to live for the rest of his life (42A-43A).

L. Value of Apartment and Roof Terrace

Plaintiff-appellant spent in excess of $50,000 improving his apartment and many thousands more on the roof terrace.

According to Leslie Crossley a real estate broker who visited the apartment seven or eight times between 1969 and 1971 the apartment was worth between $1,200 and $1,500 per month because of the high ceilings, six wood burning fireplaces and the roof garden giving country living in the city. Apartment 5 alone was worth approximately $600 to $700 per month (73A-78A). An actuary testified that at plaintiff-appellant's age he would need $17,000 in order to realize $1,000 per year based on actuarial interest at 5% and mortality tables (79A-82A).

Guiseppe Zambonini the Dean of the New York School of Interior Design testified that in October and November, 1972 he visited plaintiff-appellant's apartment fifteen to twenty times. He took photographs, made sketches and measurements. He valued the improvements plaintiff-appellant made to the apartment at $60,398.75. Some of the improvements plaintiff-appellant made included demolishing part of the building, leveling of

of ceilings, rewiring, installation of water radiators, air conditioners, taking plaster off walls and restoration of fire places. Zambonini confirmed the structural changes made by plaintiff by comparing his own floor plans with the original architectural plans made before plaintiff-appellant's improvements (83A-92A, Exs. 36, 39 and 40).**

Dorrie Rosenblatt a horticultural consultant since 1965 testified that she saw plaintiff-appellant's roof garden in June and August, 1972. The plants he had were of a rare species and very beautiful. They couldn't be moved easily. Of the 50-100 roof gardens she has seen only two or three compared with Rathborne's. Much time and work went into the roof garden (153A-155A).

John Mayer a professional horticulturist who specializes in terrace gardens and has a familiarity with the prices of outdoor materials testified he saw pictures of plaintiff-appellant's garden, a list of materials used and prices paid. He agreed the prices were fair and the species depicted in the picture were in the garden. It was a huge garden which cost about $39,691. The materials alone cost approximately $5,600, and it now would cost over $100,000 to instal such a garden ($10,000 in plant materials, the balance in labor cost) (156A-163A, 252A-254A).

Mayer stated it might have cost more to move the garden than they were worth. The boxes were connected and hard to move. He has installed hundreds of such boxes (164A-165A).

Defendants-Appellees' Case

Alexander Avalon of Munchtime testified that he had good

** These exhibits are bulky and are in the possession of plaintiff-appellant's attorney

relations with plaintiff-appellant until 1972. Rathborne gave him access to the air conditioning unit on the roof until 1972 when he refused access for cleaning and repairing. Even before 1972 plaintiff-appellant had refused access, but one of Avalon's employees was able to talk him into giving access. He also gained access to the roof from another tenant's apartment (133A-138A, 144A-145A).

Avalon further testified plaintiff-appellant did not object to the installation of the air conditioning unit, although plaintiff-appellant showed him his lease giving exclusive rights to the roof terrace. Although Munchtime had been given the right to instal the unit to the roof terrace by its lease Avalon never complained to defendants-appellees about giving exclusive rights to Rathborne because the properties were being assembled and he expected to be bought out in a few years (146A-152A).

The switch for plaintiff-appellant's electricity was in Munchtime's basement. Because of thefts Avalon told his employees not to let anyone use the basement unless he was present. He never refused plaintiff-appellant access to the basement. He told Rathborne to arrange for a time to come and repair the electrical switch. He never told any people from Consolidated Edison they couldn't go into the basement (138A-143A). This is in direct conflict with Garfinkel's testimony that it was Avalon, not he (Garfinkel) who denied access to the basement to repair the electricity (200A-202A).

The testimony of Julie Allen, Ethel Nicholas and Rathborne as well as the note from the Consolidated Edison repairmen (227A) show that it was both Garfinkel and Avalon who were denying access to repair

the electricity.

Defendants-appellees called a locksmith Joe Vitola who testified that he repaired the door locks whenever requested to do so by Garfinkel. He also testified he saw plaintiff-appellant walking in the street without shoes carrying a gun. He also said the neighborhood has deteriorated (166A-171A).

Max Steinberg, Esq. defendants-appellees' attorney testified that he prepared plaintiff-appellant's leases and that there were various disputes between Rathborne and defendants-appellees from the beginning. Rathborne was never satisfied; didn't pay his rent on time and had to be sue for it (172A-175A).

He said that while plaintiff-appellant had the right to use the roof terrace, he could not put plants on it because it was a violation of law and could stop up the gutters. No statement as to what law was violated or why they permitted plaintiff-appellant to spend thousands of hours and thousands of dollars in the allegedly illegal pursuit of building one of the finest roof gardens in New York City. Nor could he explain how in June, 1966 he could give plaintiff-appellant exclusive use of the roof extension after he gave Munchtime the right to instal an air conditioning unit on it in February, 1966. Furthermore, why would defendants-appellees get Rathborne's oral consent for the installation of the unit as they said they did, if they had already given Munchtime the right to use the roof extension in February, 1966 as the Munchtime lease states (177A-179A, 184A-186A, 193A-196A).

If there were problems between plaintiff-appellant and Munchtime it was caused by defendants-appellees giving both of them rights to the roof extension. It was defendants-appellees' responsibility to see to

it that the problem was cleared up. If that meant going to the expense of moving the unit (Avalon would have been agreeable to that) defendants-appellees were bound to have it done at their expense. But, they preferred to let this situation deteriorate to the point where both Rathborne and Munchtime were so harassed they would do nothing for each other. Defendants-appellees succeeded in again making life more difficult for plaintiff-appellant, increasing the chance that he would move out. The fact that Rathborne permitted Munchtime to service the unit for several years was not a waiver of his exclusive right to use the roof extension.

Mr. Steinberg testified plaintiff-appellant refused to let a fire inspector on the roof terrace and therefore defendants-appellees were issued a summons and paid a fine of $25 (176A-177A). He also testified the apartments leased by plaintiff-appellant are now rented for a total of $625 per month (180A-181A).

Steinberg explained that Garfinkel's threats in Justice Wahl's chambers were precipitated by improper remarks made by Rathborne. Yet, in cross examining plaintiff-appellant, Miss Allen and Mr. Davis, all of whom testified about the incident not one mention was made of any improper remarks made by Rathborne precipitating Garfinkel's threatening remarks to plaintiff (179A).

Mr. Steinberg attempted to justify compelling plaintiff-appellant to take other space for business purposes and bringing the action to decontrol Apartment #4 by stating plaintiff-appellant had a residential lease. This ignores the fact that the lease clearly gave plaintiff-appellant the right to use the apartment for business purposes and even Garfinkel admitted that before moving in plaintiff-appellant told him he

intended using Apartment #4 fo[illegible]siness purposes (181A-182A, 186A-188A, 204A, 219A).

Sol Garfinkel the President of 873 testified that on the day of the axing plaintiff-appellant came to his store and told him someone was breaking down his door. Garfinkel went up, saw the hole in the door. He accused Rathborne of breaking down the door and said "you're starting it again." He also said that he had the door repaired after the axing and before plaintiff moved. This conflicts with the testimony of Sylvia Pafenyk, Julie Allen and plaintiff-appellant who all testified Rathborne remained in the hall after the axing and that Garfinkel made numerous threatening remarks to him clearly indicating that others had axed the door, not Rathborne himself, and the testimony of Julie Allen, Ethel Nicholas and Rathborne that the door was not repaired prior to the plaintiff-appellant's vacating the apartment (197A-198A, 210A-211A).

Garfinkel denied all acts of wrongdoing including the axing, greasing the door and buzzer, refusal to make repairs to the buzzer or door lock, garbage in halls and refusal to give accers to the basement to repair the electricity. In light of the credible testimony of Ethel Nicholas, Julie Allen and Bradley Davis, the note from the Con Edison men and plaintiff-appellant's testimony these denials carry little weight. Could the District Court ignore the testimony of the unbiased witnesses, Nicholas, Allen and Davis, all former employees of plaintiff, but with no true motive to lie on his behalf. They have no financial stake in this case, no bias against defendants-appellees, in other words no good reason to commit perjury before the trial court (198A-202A).

Garfinkel did admit that when plaintiff-appellant rented Apartment 5 he informed Garfinkel he also wanted Apartment 4 which he was going to use for commercial purposes. Plaintiff-appellant told him, according to Garfinkel, that he was going to put a few flowers on the roof. He told plaintiff-appellant they would have to come down if the building inspectors said so. A few flowers! In light of Mr. Garfinkel's many moonlight excursions on the roof he knew of the fabulous garden Rathborne had created (203A-205A, 211A-212A).

Garfinkel testified about numerous late rent payments by Rathborne and giving permission to lock the roof door subject to fire department's approval (206A-208A).

Garfinkel got angry and threatened Rathborne in Justice Wahl's chambers because plaintiff-appellant made a derogatory remark to Steinberg. Garfinkel was livid with rage at plaintiff-appellant after the **airing**, in the courthouse hallway where he threatened to hit plaintiff-appellant with a bat and just about once a month for five years. He authorized Steinberg to bring an action to get plaintiff out because plaintiff got on his nerves (202A-209A).

ARGUMENT

POINT ONE

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT ARE "CLEARLY ERRONEOUS"

The District Court held plaintiff-appellant failed to show he

vacated the premises because of the wrongful acts of the defendants-appellees and failed to show he moved within a reasonable time after the wrongful acts occurred.

A. Wrongful Acts Constituting Constructive Eviction

The acts of harassment by defendants-appellees, supra, are too numerous to repeat in detail. They admitted they desired to get plaintiff-appellant out of his apartment and used every means possible to make his life so unbearable that he felt terrorized, uncomfortable, inconvenienced and sick.

> "Where the landlord's conduct is 'so grossly insulting and threatening in character as to seriously and substantially deprive the defendant of the beneficial quiet enjoyment of the premises demised' and as a result, the tenant is forced to vacate the premises, there may be a constructive eviction and a breach of the covenant of quiet enjoyment ..." Gillingham v Goldstone, 21 Misc. 2d 690, 691, 197 N.Y.S. 2d 237, 238 (Munic. Ct., Bronx Co. 1959).

The Court found that the threats by defendant-appellee Garfinkel were provoked by plaintiff-appellant. The Court cites only one specific provocation. The Court incorrectly finds Rathborne insulted Garfinkel before Garfinkel threatened him in Justice Wahl's chambers. There is no testimony to support this. Garfinkel did testify that Rathborne insulted Steinberg which provoked his threat, but Julie Allen, Bradley Davis and Rathborne, who all testified about the incident, did not testify about any provocation for Garfinkel's threats.

The Court goes on to state that Rathborne was a constant source of irritation, continually provoked Garfinkel and should have antici-

pated Garfinkel would react to his remarks. This is contrary to the evidence.

When Garfinkel threatened Rathborne after the axing, both Julie Allen and Sylvia Pafenyk testified plaintiff-appellant remained silent. He did nothing to provoke Garfinkel, even after his door had been axed with him in the apartment. Nor was there any provocation for threats by Garfinkel and Steinberg to plaintiff-appellant as testified to by Ethel Nicholas, Bradley Davis and plaintiff-appellant, discussed at pages 8 and 9, supra and the threats by Garfinkel on Rathborne's roof terrace (page 5 supra).

An example of plaintiff-appellant's lack of provocation is the testimony of Sylvia Pafenyk, another tenant and friend of Garfinkel, in answer to question from the Court about the threat after the axing:

> "THE COURT: "Prescott was just quiet and calm and peaceful?"
>
> THE WITNESS: "Well he just stood there, evidently exercising self-control and not replying in any way." (71A).

This unbiased testimony from a witness without any interest in the outcome of the action correctly portrays the relationship between Garfinkel and Rathborne. There was no provocation for this or any other threat made by defendants-appellees to plaintiff-appellant.

One or two threats might be overlooked, but the numerous threats by defendants-appellees to Rathborne could not be shrugged off by him in light of the numerous other incidents (e.g. axing, greasing of door, tampering with electricity, strangers at door, anonymous phone calls, roof visitors and numerous legal actions).

The District Court characterized many of these incidents, not as threats, but as "predictions of difficulties Rathborne would encounter unless he changed his attitudes and his actions" (XViiA). The Court lays great stress on the fact plaintiff-appellant caused much of the problem by denying access to his roof terrace to Munchtime in 1971 and 1972. The opinion ignores the fact Rathborne had been given "exclusive rights" to the roof terrace by defendants-appellees. His prior acquiesence in the occasional repair of the unit by Munchtime did not prevent him from stopping their more numerous incursions in 1971 and 1972.

Rathborne had spent many thousand of dollars and thousands of hours of labor to create a magnificent roof garden based on his lease giving him exclusive rights to use the roof terrace. He did not know that defendants-appellees had given rights to Munchtime to instal an air conditioning unit on the same roof terrace. All Rathborne did was to assert his contractual rights to protect his property and privacy.

The Court found Rathborne failed to prove intentional misconduct by Garfinkel with regard to plaintiff-appellant's lack of electricity in July, 1972. The record does not support such a finding.

When Consolidated Edison men came to check the situation on July 17 Garfinkel, not Avalon denied them access to the basement to check the cause of the problem (227A). It was Garfinkel and his attorney who refused access to plaintiff-appellant's repairmen. Only when Rathborne's attorney obtained a court order directing access be given was the electricity restored. The repairman found there had been tampering. How much more need be proved to show Garfinkel intentionally harassed Rathborne by keeping off his electricity in

July, 1972.

The Court found Rathborne moved in November, 1972 because of the deterioration of the neighborhood which commenced in 1968 and the dangers it posed to residents (XViiA-XViiiA). This, despite the indisputable testimony that Rathborne had expended very large sums of money re-doing the entire apartment, had built a fabulous roof garden and intended making the apartment his home for life. While Rathborne did not like the deterioration of the neighborhood the record is clear that he never would have moved if not harassed by defendants-appellees.

It was the wrongful actions of defendants-appellees that deprived Rathborne of the beneficial enjoyment of his apartment and constituted a constructive eviction. Barash v Pennsylvania Terminal Real Estate Corp., 26 N.Y. 2d 77, 82, 256 N.E. 2d 707, 709 (1970).

Further, there were many other acts of harassment proven at trial which were not even discussed in the Court's opinion.

Defendants-appellees compelled Rathborne to rent another apartment in the building for business use, eventhough he had the right to use Apartment 4 for business purposes (219A). They were able to coerce Rathborne until his attorney told him he didn't have to rent the additional apartment.

Defendants-appellees compelled Rathborne for several years to pay $75 per month above the maximum rent and rent called for in the lease until his lawyer brought an action, successfully, to recover $2,000 in overcharges.

Defendants-appellees brought numerous legal actions in court and before the rent commission and against Rathborne, including an action to

decontrol one of the apartments on unfounded grounds.*

As can be seen from the foregoing the Court's findings of fact and conclusions of law were "clearly erroneous" and the harassment of defendants-appellees constructively evicted plaintiff-appellant. Spock v David, 469 F 2d 1047, 1053 (3rd Cir. 1972).

The Supreme Court of the United States defined the term "clearly erroneous" in United States v United States Gypsum Co., 333 U.S. 364, 395, 68, S. Ct. 525, 542, 92L Ed 746, 766 (1948).

> "A finding is 'clearly erroneous' when although there is evidence to support it, reviewing court on entire evidence is left with definite and firm conviction that a mistake has been committed." See also, Commissioner v Duberstein, 363 U.S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960); Romero v Garcia & Diaz, Inc., 286 F. 2d 34 (2d Cir.), cert. denied, 365 U.S. 869 (1961).

The actions of defendants-appellees were intended to and did put Rathborne in such fear of his life and property that he could no longer bear to live in his apartment. He was justified in leaving and is entitled to recover his losses caused by defendants-appellees' wrongful acts. Onward Const. Co. v Harris, 144 N.Y. Supp. 318 (App. Term, 1st Dep't 1913) (insulting and threatening letters sent by landlord to tenant); Purcell v Leon, 144 N.Y. Supp. 348 (App. Term, 1st Dep't. 1913) (where landlord kept on an insulting janitor after having notice of his insulting remarks).

In addition to Garfinkel's hatred of Rathborne he was also motivated by money. Mr. Avalon testified the block was being assembled and it

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* The apartment was decontrolled without a hearing or an inspection. An appeal of that decision was rendered moot when plaintiff-appellant vacated the apartment.

was just a matter of time before he was bought out. Plaintiff-appellant testified Garfinkel told him he had turned down an offer of $1,000,000 for his interests. Rathborne was the only statutory tenant in the building. If Garfinkel could get Rathborne out, the building would have greater value since he would not have to be compensated for his vast improvements and the value of his tenancy.

In the fall of 1972 for the first time Rathborne was driven to the point of seeing a psychiatrist and finally to moving to New Orleans to "escape" the harassment. Considering what he was leaving behind this was a difficult and dramatic decision. He had lived in the apartment for seven years and loved it. He had given his all to the apartment, both spiritually and financially. He had at great time and expense built a beautiful garden and put costly improvements in the apartment. He knew he could not take these things with him, yet he felt so harassed that he was compelled to move for his own mental health.

There is no support in the record for the Court's ruling that defendants-appellees wrongfuly conduct did not cause plaintiff-appellant to vacate the apartment causing a constructive eviction. That ruling must be set aside as "clearly erroneous". Humphrey v Southwestern Portland Cement Company, 488 F. 2d 691, 694 (5th Cir. 1974); U.S. ex. rel. Paxos v Rundle, 491 F. 2d 447, 452 (3rd Cir. 1974); Case v Morrisette, 475 F. 2d 1300, 1307 (D.C. Cir. 1973).

B. Plaintiff-Appellant Moved From the Apartment Within a Reasonable Time After Defendants-Appellees' Wrongful Acts

The Court held that even if Garfinkel's acts constituted a constructive eviction Rathborne cannot complain because he did not vacate the

premises within a reasonable time after the acts occurred (XViiiA). This holding is neither factually or legally correct.

The Court refers to acts of the defendants-appellees in 1966, 1970, one act in June, 1972 and another in July, 1972. The Court fails to refer to:

a) Threats by Garfinkel to Rathborne on his roof between June and November, 1972, (page 5 supra);

b) Threats made to Rathborne through his lawyer by counsel for the defendants-appellees in September, 1972, (page 9 supra);

c) Action to decontrol Apartment #4 which was still pending when Rathborne moved in November, 1972, (page 11 supra);

d) Harassment proceeding was commenced by Rathborne in September, 1972 due to continued harassment of defendants-appellees. That action was still pending when Rathborne moved out, (page 12 supra);

e) Rathborne was finally driven to consult a psychiatrist on October 9, 1972, (page 13 supra);

The acts of harassment did not end until Rathborne moved out of his apartment. They continued to the end, unabated. Rathborne did not sit around and wait many months after the end of the harassment before moving. He stayed in the apartment he created and loved until he could bear it no longer and moved out.

The acts of harassment commenced earlier in the tenancy increased in intensity in 1972 so the fact Rathborne remained in the apartment until November, 1972 should not bar him from recovery for defendants-appellees wrongful eviction. Batterman v Levenson, 102 Misc. 92, 168 N.Y. Supp. 197 (Sup. Ct., App. Term, 1917); Siebold v Heyman, 120 N.Y.

Supp. 105 (Sup. Ct. App. Term 1909).

This is not a case of a tenant who moves into an apartment and after a few months or a year is harassed or finds vermin or lacks heat or hot water, and then stays on several months before moving, as in the case cited by the Court in its opinion. Rathborne lived in the apartment for seven years, expended thousands of dollars improving the apartment and roof terrace. He knew he could not take the improvements with him. He was entitled to consider his moving for a reasonable time. Since acts of harassment continued into August and September and beyond, Rathborne's move in November was well within the bounds of reasonableness. Esaree v Holland, 269 N.Y. Supp. 745 (App. Div. 2nd Dep't, 1934); Dunton v Sweet, 210 Mich. 648, 177 N.W. 962 (1920); Greenstein v Conradi, 161 Minn. 234, 201 N.W. 602 (1924); Leider v 80 William St. Co., 22 A.D. 2d 952, 255 N.Y.S. 2d 999 (2d Dep't, 1964).

POINT TWO

PLAINTIFF-APPELLANT WAS PREJUDICED BY THE COURT'S CONDUCT OF THE TRIAL

Prior to trial the Court directed among other things, that the parties supply the Court with a full statement of the testimony of each witness and underlined portions of Mr. Rathborne's pre-trial deposition showing the portions to be offered at trial. Plaintiff-appellant complied with this direction (263A-265A).

Prior to trial the Court read Mr. Rathborne's entire deposition consisting of over 200 pages (265A). Neither party ever offered any portion

of the Rathborne deposition in evidence, but the Court improperly formed fixed opinions as to Mr. Rathborne from the deposition. The trial that followed was conducted by the Court and not the attorneys. It evidenced the fact that the Court had already reached a decision and was now making the record.

Normally, "it will be presumed that absent, a clear showing to the contrary, that the Trial Court, relied only upon proper evidence in reaching its conclusion." United States v 396 Corp., 264 F. 2d 704, 709 (2d Cir.), cert. denied, 361 U.S. 817 (1959); Brubeck v Pennsylvania Railroad Company, 346 F. 2d 238 (7th Cir. 1965). But here it is clear there is evidence to the contrary that the court decided this case from the Rathborne deposition.

Right at the outset of trial the Court made it clear that it would broach no stalling, that the case would be completed that afternoon, constantly stressing that he had read a deposition not in evidence (255A-256A). An example of the Court's attitude at the trial is the following discussion:

> "THE COURT: That lawyer will be hear to testify?
>
> MR. JACOBS: Yes.
>
> THE COURT: What time is he coming?
>
> MR. JACOBS: He will be here at two o'clock.
>
> THE COURT: You had better telephone him and tell him to come early. I told you yesterday when you run out of witnesses, you close your case.
>
> MR. JACOBS: Your Honor, I have four witnesses for this morning.
>
> THE COURT: If you are satisfied, that's all right with me." (257A).

The Court then conducted the trial. From the statements summarizing the prospective testimony of each of plaintiff-appellant's witnesses the Court conducted the direct examination of each of the witnesses, permitting counsel to briefly add to the testimony. The Court improperly took the conduct of the trial from the lawyers since it had already reached a fixed opinion of plaintiff-appellant and his case from reading Rathborne's deposition. Virginian Ry. Co. v Armentrout, 166 F. 2d 400, 405 (4th Cir. 1948).

For example after the Court had examined Ethel Nicholas extensively and Rathborne's counsel had asked six questions the following transpired:

> "THE COURT: Okay. That's all.
>
> MR. JACOBS: Just a few more
>
> THE COURT: What else do you want to ask her? I covered everything that was in your statement." (56A).

Towards the end of the first day of the trial the Court and counsel for plaintiff-appellant had a disagreement about the manner in which exhibits were to be introduced (258A-259A). At that time the Court made known its feelings about plaintiff-appellant gotten from the Rathborne deposition:

> "THE COURT: I read the deposition of Mr. Rathborne where he questions the right of a lawyer to ask him these questions. Time after time he took a legalistic attitude. Why don't you try this case like a man instead of doing it the way you have been doing all along.
>
> MR. JACOBS: I took a legalistic attitude?

THE COURT: Your client did. Look at the deposition. Day after day he refused to admit certain things were true. Day after day he couldn't understand what the questions were. I can see he is a difficult person." (259A-260).

Earlier the Court had stated it knew from the deposition how difficult it was to get Rathborne to answer a question directly (45A).

Plaintiff-appellant was denied a fair and impartial trial by the manner in which the Trial Court conducted the trial and is thereby entitled to a new trial. Nordmann v National Hotel Company, 425 F. 2d. 1103, 1109 (5th Cir. 1970). He was entitled to a trial conducted by his own lawyer free from the pressure of a Court which had improperly arrived at a fixed opinion about him prior to trial.

CONCLUSION

FOR THE FOREGOING REASONS THE JUDGMENT SHOULD BE REVERSED AND JUDGMENT ENTERED FOR PLAINTIFF-APPELLANT OR A NEW TRIAL GRANTED

Respectfully submitted,

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